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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Petitioners

v.

TENNESSEE VALLEY AUTHORITY, ALABAMA POWER COMPANY, DUKE ENERGY CORPORATION, TENNESSEE VALLEY PUBLIC POWER ASSOCIATION, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF TENNESSEE VALLEY AUTHORITY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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DISCLOSURE STATEMENT

The Tennessee Valley Authority is organized and existing pursuant to the Tennessee Valley Authority Act of 1933, *as amended*, 16 U.S.C. §§ 831-831ee (2000), and has no parent corporation. No publicly held company has any ownership interest in TVA.

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STATEMENT

This unusual case arises out of an Environmental Protection Agency (EPA) enforcement initiative, in which EPA charged a number of electric utilities, including the Tennessee Valley Authority (TVA), with violating the Clean Air Act's New Source Review (NSR) provisions over the preceding twenty years. In November 1999, EPA brought civil actions in federal district courts against seven utilities located in the Midwest and South and issued an Administrative Compliance Order (ACO) to TVA under section 113(a) of the

Clean Air Act (CAA), 42 U.S.C. § 7413(a) (2000). At the same time, the Administrator of EPA and the Attorney General held a press conference, in which they announced that all the targeted utilities were guilty of serious violations of law and that they would seek significant penalties against these utilities.[1]

Prior to issuing the ACO against TVA, EPA held no hearing of any kind, and it has no published procedures for doing so. Nevertheless, in the ACO EPA concluded that TVA had violated the CAA when it performed numerous repair projects at nine of TVA's coal-fired electric generating plants over the past two decades without preconstruction permits, and ordered TVA to begin undertaking costly compliance activities immediately. Pet. App. at 2a, 13a, 56a-57a, 74a n.20, 107a-110a. After receiving the ACO, TVA informed EPA that, in TVA's view, the ACO was not valid because TVA had complied with the law. In particular,

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[1] See Pet. App. at 13a; November 3, 1999, Department of Justice Press Release, http://www.usdoj.gov/opa/pr/1999/November/524enr.htm; November 3, 1999, Speech of Carol M. Browner, http://www.epa.gov/compliance/civil/programs/caa/coal/browner.html.

Since that time, several district courts have ruled on the merits of EPA's complaints, and have reached diametrically opposing conclusions. *Compare United States v. Duke Energy Corp.*, 278 F. Supp. 2d 619 (M.D.N.C. 2003), *with United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829 (S.D. Ohio 2003). Further, EPA issued new NSR regulations and an interpretation of NSR, 68 Fed. Reg. 61,248-61,280 (Oct. 27, 2003), that make clear that the TVA projects that were targeted by the ACO would not violate the CAA. The validity of these regulations now is the subject of litigation in the District of Columbia Court of Appeals. *See State of New York v. U.S.E.P.A.*, Docket No. 02-1387 (and consolidated cases).

In addition, several groups have sued TVA in district courts under the citizen-suit provision of the CAA, 42 U.S.C. § 7604 (2000), alleging that some of the same projects targeted by EPA violate the CAA's NSR provisions.

TVA's position was that EPA's NSR rules did not require permits because TVA's projects were "routine maintenance, repair, and replacement" projects that did not increase emissions of regulated pollutants, and that EPA had changed its interpretation of those NSR rules retroactively without fair notice to TVA and other regulated parties. Pet. App. at 13a-14a n.12. TVA also informed EPA that TVA intended to petition for review of the order pursuant to the CAA, which TVA did on May 4, 2000. Because TVA's compliance with the ACO would cause adverse economic effects for other utilities that are interconnected with and purchase power from TVA, as well as for the retail distributors of TVA's power, Alabama Power Company, Duke Energy Corp., the Tennessee Valley Public Power Association (an organization of municipal and cooperative TVA distributors) and a number of individual distributors filed similar petitions for review in the Eleventh Circuit. See Pet. App. at 54a n.1, 90a-98a.

The same day that TVA's petition was filed, EPA "took a step that it describes as 'exceedingly unusual': it decided to 'reconsider' the ACO by 'adjudicating' the issue of whether TVA had violated the CAA when it undertook several plant modifications without a permit." Pet. App. at 14a. The Administrator delegated this task to her own appointees within her office, the Environmental Appeals Board (EAB). *Id.* at 14a-16a. EPA had never before conducted such a proceeding, and the scheme it created specifically for the TVA proceeding was not a typical agency adjudication. The EAB appointed an administrative law judge to take evidence, but instructed him not to make any findings of fact and conclusions of law. *Id.* at 16a. Instead, the EAB itself rendered findings and conclusions. The ALJ characterized the process as "'an invented . . . ad hoc procedure. . . . It's not described in any rule or regulation or statute.'" *Id.* at 18a. As the Eleventh Circuit later found, the EAB proceeding lacked a neutral decisionmaker; rendered discovery effectively unavailable by precluding compulsory process; limited

testimony at the behest of the Administrator; and was unduly rushed, giving TVA only a few weeks to prepare a defense involving more than twenty repair projects over a twenty-year period at fourteen generating units located at nine plants in three states. *Id.* The EAB ultimately "affirmed" most of the ACO. *Id.*

TVA and its copetitioners sought review of the EAB decision in the Eleventh Circuit. EPA moved to dismiss all of the petitions on grounds that TVA lacked independent litigating authority to bring the action over the objection of the Attorney General, and that the dispute between TVA and EPA was not subject to judicial review because it was an interagency dispute that did not present a case or controversy. Pet. App. at 59a. EPA also contended that TVA's copetitioners lacked standing, and that the ACO was not final (a view the Court of Appeals ultimately accepted, but on different grounds from those asserted by EPA). *Id.* at 59a-60a.

The Eleventh Circuit rejected most of EPA's jurisdictional contentions. In particular, the Court of Appeals held that TVA's independent litigating authority had been unanimously upheld by the courts, including three times over the Attorney General's objection, and that the language of the TVA Act, subsequent enactments by Congress, TVA's unique history of independence from centralized control in Washington, and TVA's long history of self-representation confirmed that TVA was authorized to bring suit and to represent itself. Pet. App. at 61a-64a.

Further, the Eleventh Circuit held that "this particular controversy between these executive branch agencies is justiciable." *Id.* at 74a. In making this narrow ruling, the Court of Appeals reviewed the pertinent decisions of this Court and the lower federal courts at length (*id.* at 64a-74a), and followed this Court's analysis in *United States v. Nixon*, 418 U.S. 683 (1974). The court specifically found that TVA's challenge to the ACO was traditionally justiciable

because the CAA "explicitly provides for judicial review" of final actions of the Administrator, and that the setting of the controversy involved concrete adversity because of TVA's unique independence as a federal agency and the genuinely conflicting views advocated by TVA and EPA. Pet. App. at 73a-74a. The Eleventh Circuit also held that the eight other petitioners had standing to challenge EPA's order because, among other things, it affected their economic interests as interconnected utilities and purchasers of TVA electricity and was likely to be used against them in parallel litigation. *Id.* at 89a-98a; see also briefs in opposition filed by Alabama Power, Duke Energy, and TVPPA.

As to finality, the Eleventh Circuit initially held that the order at issue was final, Pet. App. at 74a-76a, but after further briefing and oral argument on the merits, the court reconsidered this holding and concluded that the ACO was not final. *Id.* at 3a. Specifically, the court held that the ACO did not meet the second prong of the test set forth by this Court in *Bennett v. Spear*, 520 U.S. 154 (1997) (final agency action must be one from which legal consequences flow). In so doing, the court examined the law of finality at length (*id.* at 20a-22a); discussed problems associated with judicial review of ACOs that were both unadjudicated and "adjudicated" prior to issuance (*id.* at 28a-30a); considered the legislative history of section 113 with respect to finality and judicial review (*id.* at 30a-37a); and held that under the language of the CAA, ACOs have the status of law. *Id.* at 39a. After reviewing the case law and finding that no other court had addressed the constitutional issues posed by the statutory scheme (*id.* at 39a-43a), the court concluded that giving ACOs the status of law would be repugnant to the Due Process Clause, because "[b]efore the Government can impose severe civil and criminal penalties, the defendant is entitled to a full and fair hearing before an impartial tribunal 'at a meaningful time and in a meaningful manner.'" *Id.*

at 43a.[2] The Eleventh Circuit held that the ACO thus had no legal consequences, was not final for purposes of review, and dismissed the case for lack of jurisdiction. *Id.* at 46a. Costs were taxed against TVA and its copetitioners. *See* Appendix hereto at 2a.

REASONS THE PETITION SHOULD BE DENIED

A. EPA Prevailed Below.

EPA asked the Eleventh Circuit to dismiss this case for lack of subject matter jurisdiction on grounds that the ACO was not final. Pet. App. at 59a. The Court of Appeals did just that. Pet. App. at 3a, 46a. In its petition, EPA does not seek reversal of the judgment of dismissal, and does not affirmatively contend that the ACO *was* final agency action. EPA instead argues that the court erred in its reasoning, and asks for further review in order to obtain another judgment of dismissal on different jurisdictional grounds from those articulated by the Eleventh Circuit. In particular, EPA agrees with the Eleventh Circuit's holding that the ACO issued to TVA had no legal consequences and was not final agency action (Pet. at 28), but contests the Eleventh Circuit's reasoning that the ACO lacked legal consequences because it was not preceded by a fair adjudication. Instead, EPA would substitute a ruling that the ACO lacked legal consequences on justiciability grounds. EPA thus "challenge[s] the *rationale* relied on by the Court of Appeals. '[T]his Court,' however, 'reviews judgments, not opinions.'" *Texas v. Hopwood*, 518 U.S. 1033, 1034 (1996) (denying petition for writ of certiorari; Ginsburg, J., joined by Souter, J.), *citing Chevron*

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[2] The court also pointed out that EPA could not voluntarily "adjudicate" before issuing an ACO because "[t]his is not an area in which the organic statute has set a vague standard. . . . The EPA cannot . . . amend the statute." In addition, "a pre-ACO adjudication would only highlight another constitutional problem," namely, the unconstitutional delegation of judicial power to a non-Article III court. Pet. App. at 44a-46a.

U.S.A., Inc. v. Natural Resources Def. Council, Inc., 467 U.S. 837, 842 (1984) (emphasis in original). Accordingly, EPA's petition falls squarely within the rule that "a party may not appeal from a favorable judgment simply to obtain review of findings it deems erroneous." *Mathias v. WorldCom Techs., Inc.*, 535 U.S. 682 (2002); *see also* Robert L. Stern, et al., *Supreme Court Practice* § 2.4, at 45 (7th ed. 1993) (granting petition of prevailing party "would seem to be inconsistent with the Court's settled refusal to entertain an appeal by a party successful in obtaining a final judgment in his favor in the lower court").

Further review of this case, which was dismissed below at the instance of Petitioner EPA, is unwarranted.

B. The Second and Third Questions Presented Are Immaterial to the Disposition of This Case.

This case is not simply a dispute between TVA and EPA; eight additional parties petitioned the Eleventh Circuit for review of EPA's decision, Pet. at II, and their petitions were consolidated with TVA's. Pet. App. at 59a. The Eleventh Circuit held that each of those parties had standing under Article III sufficient to create a "case or controversy." *Id.* at 89a-98a. EPA "has not petitioned for review" of that holding. Pet. at 29. As this Court has made plain, the "presence of one party with standing assures that [the] controversy before [the] Court is justiciable." *Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316, 330 (1999), *citing Director, Office of Workers' Comp. Programs v. Perini N. River Assocs.*, 459 U.S. 297, 303-05 (1983). Accordingly, even if EPA were correct (which it is not) that this dispute between it and TVA is not justiciable, or that TVA had no authority to file the case over the Attorney General's objection, this case is a justiciable "case or controversy" because of the presence of the other parties with standing to bring suit on their own behalf. The issues of TVA's litigating authority and justiciability thus do not warrant further review.

C. TVA Has Independent Litigating Authority.

TVA's independent litigating authority has been upheld by every court that has considered the matter, and there is no conflict among the courts of appeals on this issue. Further, the determination of the issue involves statutory and historical matters unique to TVA, and the issue is infrequently presented. Even assuming EPA has standing to raise the Attorney General's objections to TVA's litigating authority, EPA cites none of this Court's Rule 10 considerations in seeking certiorari on this issue. Instead, EPA simply asserts that the Eleventh Circuit "erred." Pet. at 23. That assertion is wrong.[3]

EPA argues that the Attorney General is authorized to control TVA's litigation under statutes providing that, "[e]xcept as otherwise authorized by law," the Attorney General conducts and supervises litigation involving the United States. 28 U.S.C. §§ 516, 519 (2000). The Eleventh Circuit properly rejected this argument, Pet. App. at 61a-64a, holding that, under the TVA Act and the unanimous case law, TVA has independent litigating authority to bring suit over the objection of the Attorney General:

> Since its inception in 1933, TVA has represented itself in litigation by attorneys of its own choosing. Moreover, on three separate occasions, TVA conducted litigation over the objections of the Attorney General, and in all three cases the courts found that TVA had independent litigating authority under the TVA Act. *See Dean v. Herrington*, 668 F. Supp. 646 (E.D. Tenn. 1987); *Cooper v. TVA*, 723 F.2d 1560 (Fed. Cir. 1983);

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[3] Additionally, as noted in Section B above, a reversal of the Eleventh Circuit's ruling would not affect the ultimate disposition of this case because the other respondents would remain as parties with standing to raise the finality (and constitutionality) of the ACO.

Algernon Blair Indus. Contractors, Inc. v. TVA, 540 F. Supp. 551 (M.D. Ala. 1982).

Pet. App. at 61a.

The cited cases and the Eleventh Circuit all held that TVA is authorized by law to represent itself based on the language of the TVA Act,[4] the "unique history of TVA and its intended independence" from centralized control in Washington,[5] Congress' subsequent and repeated confirmation of TVA's independent litigating authority in both statutes and other congressional documents,[6] and TVA's long history of self-representation without objection by the Attorney General. Pet. App. at 61a-64a.

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[4] The TVA Act provides that TVA's three-member Board of Directors "shall direct the exercise of all the powers of the Corporation." 16 U.S.C. § 831a(g). TVA's corporate powers include, among others, the powers to "sue and be sued" (16 U.S.C. § 831c(b)), to appoint attorneys and define their duties (16 U.S.C. § 831b), to settle all claims and litigation (16 U.S.C. § 831h(b)), and all other powers "necessary and appropriate for the exercise of the powers herein specifically conferred" (16 U.S.C. § 831c(g)).

[5] See the extensive discussion of TVA's history in *Algernon Blair Indus. Contractors, Inc. v. TVA*, 540 F. Supp. 551 (M.D. Ala. 1982).

[6] *See, e.g.*, Customs Court Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (preserving TVA's existing authority to represent itself by attorneys of its choosing); Federal Courts Improvement Act of 1982, § 169, Pub. L. No. 97-164, 96 Stat. 25, 51 (same); S. Doc. No. 56, 76th Cong., 1st Sess. at 62, 68 (1939) ("[TVA], unlike ordinary Government departments, has no statutory right to demand legal assistance from the Department of Justice"); S. Rep. No. 261, 83d Cong., 1st Sess. 3 (1953) (explaining that TVA was exempted from Court of Claims jurisdiction because it would be expensive and burdensome to have TVA attorneys and witnesses travel to Washington); S. Rep. No. 95-1118, 95th Cong. 2d Sess., at 21 (1978), *reprinted in* 1979 U.S.C.C.A.N. 5235, 5255 (under the Contract Disputes Act of 1978, "because the Tennessee Valley Authority handles its own litigation, its attorneys, rather than the Attorney General, will enforce its rights. . .").

EPA acknowledges that the Attorney General conducts and supervises litigation "[e]xcept as otherwise authorized by law" (28 U.S.C. §§ 516, 519), but argues there is an "important purpose served by centralizing federal litigation." Pet. at 23-24. However, Congress can decide that other purposes are more important in particular instances, and may authorize independent litigating authority where it so chooses. *United States v. Providence Journal Co.*, 485 U.S. 693, 705 n.9 (1988). Here, Congress has "otherwise authorized" an agency to represent itself to make it independent of centralized federal control, so that TVA can function much like a private business corporation. As the Eleventh Circuit explained, quoting *Dean v. Herrington*, 668 F. Supp. at 652 n.1:

> From its inception, TVA has enjoyed an independence possessed by perhaps no other federal agency. The original House Committee stated upon TVA's inception: "We intend that [TVA] shall have much of the essential freedom and elasticity of a private business corporation." TVA's independence is underscored by its corporate form, its maintenance of a separate legal staff, its removal from centralized control in Washington, its discretionary ratemaking authority, and its exemption from at least 16 provisions of the Administrative Procedure Act.

Pet. App. at 63a-64a (citations omitted). Furthermore, the Eleventh Circuit correctly pointed out that:

> [I]n 1983, Congress confirmed TVA's independent litigating authority when it prohibited the Attorney General from using any funds appropriated by Congress "to represent the Tennessee Valley Authority in litigation" unless requested by TVA to do so. Public Law No. 98-181, § 1300, 97 Stat. 1292. The congressional history for this prohibition reveals the following: "In its 50-year history, TVA has conducted its own litigation and no court at any level has ever questioned TVA's right to do so. If TVA were to delegate or

> otherwise surrender jurisdiction over its legislatively mandated responsibilities for litigation in this area, it would seriously undermine its independence over all other aspects of its program."

Pet. App. at 64a (citation omitted).

Despite this clear manifestation of congressional intent, EPA argues that the Attorney General has not attempted to represent TVA here, but rather to exercise his purported authority to prohibit TVA from bringing suit. Pet. at 26. But he has no such authority with respect to TVA. Any authority to prohibit the initiation of a lawsuit exists only by virtue of the Attorney General's statutory power to "conduct" and "supervise" litigation (28 U.S.C. §§ 516, 519), and he has no such power where Congress has "otherwise authorized" an agency to control its own litigation. *Id.* Here, Congress instructed in the TVA Act that *the TVA Board of Directors* (and not the Attorney General) directs the exercise of *all* of TVA's powers, 16 U.S.C. § 831a(g), including the power to sue. And Congress has repeatedly confirmed that it intended to place the power to control TVA's litigation in the hands of the TVA Board of Directors, most recently explaining that it expressly prohibited the Attorney General from representing TVA to stop the efforts of the Department of Justice from encroaching on TVA's independence:

> The Department of Justice has, on a number of occasions sought to assume jurisdiction over TVA's litigation activities. The Department currently is responsible for most other Federal litigation and it contends that TVA, as a Government corporation, should be under its jurisdiction . . . . [T]he Tennessee Valley [Authority] Act of 1933 clearly stipulates that TVA is responsible for all of its own litigation. . . . Since the Department of Justice has indicated its continuing desire to intervene in the litigation activities of the TVA, the committee is

> recommending a legislative prohibition to reiterate the clear intention of the Congress to prevent the Department of Justice from representing TVA in litigation.

H.R. Rep. No. 98-232, 98th Cong., 1st Sess., at 45-46 (1983).[7] Congress thus made perfectly clear that, when it prohibited the Attorney General from using appropriated funds to "represent" TVA in litigation, Pub. Law. No. 98-181, § 1300, Congress intended to preclude him from interfering with any aspect of TVA's responsibility for its own litigation. These Congressional declarations, together with all of the other reasons cited by the courts, demonstrate that TVA is "otherwise authorized by law" to bring suit and to represent itself over the objections of the Attorney General.[8]

Although Congress and four federal courts have agreed that TVA has independent litigating authority, EPA asks this

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[7] EPA argues that this provision "should not be understood implicitly to have repealed the Attorney General's generally applicable authority." Pet. at 26. It was not a repeal at all; as the legislative history shows, Congress "confirmed" TVA's independent litigating authority granted by the TVA Act specifically in response to the Department of Justice's efforts to control TVA's litigation activities. Pet. App. at 64a.

[8] The cases cited by EPA in support of the Attorney General's authority, Pet. at 24, are inapposite. *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888), merely stands for the proposition that there must be someone who can file suit for the United States rather than no one at all. *United States v. Walcott*, 972 F.2d 323, 326 (11th Cir. 1992), is not pertinent because, unlike TVA, the Small Business Administration there did not contend that "Congress . . . 'otherwise authorized' the SBA to conduct its own litigation." *Id.* at 327. And *Sutherland v. Int'l Ins. Co. of New York*, 43 F.2d 969 (2d Cir. 1930), involved the question of whether the President had delegated litigating authority to the Alien Property Custodian under a World War I Executive Order. *Id.* at 971. The case's limited reach is shown by *SEC v. Robert Collier & Co.*, 76 F.2d 939 (2d Cir. 1935), where Judge Hand distinguished *Sutherland* in holding that the SEC could appear in court by its own solicitor rather than the Attorney General. None of EPA's cases bear on whether TVA is "otherwise authorized by law" to conduct its own litigation.

Court to adopt a new, higher standard for evaluating whether an agency has independent litigation authority, which it calls the "clear statement" standard, and then argues that this case does not meet that standard. Pet. at 24-26. But there is no such "clear statement" standard. As this Court has already explained, in *United States v. Providence Journal Co.*, 485 U.S. 693, 705 n.9 (1988), Congress can choose to exempt litigation from the authority of the Attorney General, and such exemptions must be

> subjected to the ordinary tools of statutory construction to determine whether Congress intended to supersede § 518(a). Indeed, Congress has enacted some provisions that suggest exceptions to the blanket coverage of § 518(a). *See, e.g.*, Federal Courts Improvement Act of 1982, § 169, 96 Stat. 51 (preserving existing authority of the Tennessee Valley Authority "to represent itself by attorneys of its choosing").

Applying "ordinary tools of statutory construction," as the Eleventh Circuit did below and as have all the other courts that have considered the issue, there is no doubt that TVA has authority to litigate independently of the Attorney General.[9]

D. This Controversy Is Justiciable.

The Eleventh Circuit held that the particular controversy between TVA and EPA in this case is justiciable. In doing

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[9] EPA also asserts that the Attorney General's failure to exercise control over TVA's litigation for more than fifty years does not mean that he lacks the power to do so. But as EPA itself points out, "'[t]he fact that powers long have been unexercised well may call for close scrutiny as to whether they exist.'" Pet. at 26 (*quoting United States v. Morton Salt Co.*, 338 U.S. 632, 647 (1950)). The court below gave such close scrutiny, observing that "Congress has repeatedly recognized TVA's responsibility for its own litigation," Pet. App. at 62a, and that TVA's intended independence and its unique history "compel the results reached" by the Eleventh Circuit, as well as by the courts in *Algernon Blair*, *Cooper*, and *Dean*. *Id.* at 63a.

so, the Court of Appeals correctly applied precedent of this Court and the lower federal courts to the specific circumstances of this case. That decision does not conflict with any decision of either this Court or any court of appeals, and it does not warrant further review, especially because of the existence of eight other parties with standing.

EPA argues here, as it did below, that the dispute between TVA and EPA is not justiciable because TVA and EPA are, according to EPA, in effect a single entity. In an extensive opinion, Pet. App. at 64a-74a, the Eleventh Circuit thoroughly considered and rejected that contention, holding that "TVA possesses unique independence as a federal agency." Pet. App. at 73a. This is clearly correct. Congress indicated in the Conference Report on the TVA Act that "[w]e intend that the corporation shall have much of the essential freedom and elasticity of a private business corporation." H.R. Rep. No. 130, 73d Cong., 1st Sess. 19 (1933). The TVA Act confirms this, providing, among other things, that TVA is run by a Board of Directors, that TVA's employees are not subject to the federal Civil Service laws, that TVA's purchasing activities are independent of general federal procurement laws, and that TVA's financing bonds are not obligations of the United States.[10] Indeed, TVA currently

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[10] TVA's Board of Directors is mandated to "direct the exercise of all the powers of the Corporation." 16 U.S.C. § 831a(g). The TVA Board is prohibited from giving or considering any "political test or qualification" in appointments and promotions. 16 U.S.C. § 831e. TVA's personnel actions are "without regard to the provisions of Civil Service laws applicable to officers and employees of the United States." 16 U.S.C. § 831b. Its purchasing activities under section 9(b), 16 U.S.C. § 831h(b), are independent of statutes generally applicable to federal procurements. TVA is authorized to issue bonds to finance its power activities, which are expressly not obligations of the United States. 16 U.S.C. § 831n-4(b). TVA's statutory financing scheme contemplates that TVA customers will finance TVA's operations. *In re Payment by Fed. Highway Admin. to TVA for Damage to Electrical Transmission Towers*, No. B-253613, 1993 U.S. Comp. Gen. LEXIS 1152 (Dec. 3, 1993). TVA is authorized to sell

receives no congressional appropriations for its activities. Congress has repeatedly acknowledged TVA's unique nature, for example by precluding suit in the Court of Federal Claims against TVA, 28 U.S.C. § 1491(c) (2000), and exempting TVA from the Federal Tort Claims Act. 28 U.S.C. § 2680(*l*) (2000). And this Court has recognized that TVA "'is a corporate entity, separate and distinct from the Federal Government itself.'" *Pierce v. United States*, 314 U.S. 306, 310 (1941).

Despite TVA's distinct status, EPA asserts here, as it did below, that there is a "general rule that a dispute between two government agencies whose heads serve at the pleasure of the President does not result in a justiciable 'case or controversy,'"[11] and that while there are exceptions to that "rule," this case does not fit within them. Pet. at 19. This is not the law, and the Eleventh Circuit properly so held.

No decision of this Court or any court of appeals recognizes a "general rule" against justiciability. To the contrary, this Court has expressly rejected the suggestion that there is a "general rule" against judicial review of intrabranch disputes, holding that "[t]he mere assertion of a claim of an 'intra-branch dispute,' without more, has never operated to

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products to the United States. 16 U.S.C. § 831d(j). And the TVA Act empowers TVA to use proceeds from its power operations "in conducting *its* business in generating, transmitting, and distributing electric energy." 16 U.S.C. § 831y (emphasis added).

[11] Whether TVA's fixed–term Board members serve "at the pleasure of the President" is an issue never decided by this Court. The only case involving removal of a TVA Board member is *Morgan v. TVA*, 115 F.2d 990 (6th Cir. 1940). However, *Morgan* involved a removal "taken after inquiry, and for a stated cause," 28 F. Supp. 732, 733 (E.D. Tenn. 1939), and applied doctrines this Court has since rejected. *See Wiener v. United States*, 357 U.S. 349 (1958) (limitations on removal power may be implied from attributes of office); *Morrison v. Olson*, 487 U.S. 654, 689-91 and nn.27-28 (1988) (rejecting analytical framework based on characterizing official duties as "executive" or "quasi-legislative").

defeat federal jurisdiction; justiciability does not depend on such a surface inquiry." *United States v. Nixon*, 418 U.S. 683, 693 (1974) (*Nixon*). Indeed, this Court has held justiciable a case that could be styled "*United States v. United States, et al.*," holding that "the established principle that a person cannot create a justiciable controversy against himself has no application" to an intra-government dispute that "involves controversies of a type that are traditionally justiciable." *United States v. ICC*, 337 U.S. 426, 430-31 (1949).[12]

Nor are the "exceptions" asserted by EPA recognized in the case law. EPA attempts to read a number of cases involving intra-governmental disputes—*none of which held any such dispute non-justiciable*—as if they set forth "exceptions" to a "general rule" of non-justiciability. See Pet. at 21-22. The Eleventh Circuit rightly rejected this approach, noting that "none of the cases identified by EPA delineate three narrow exceptions to a general rule of non-justiciability. Each of these cases addressed only the situation before the court and did not purport to establish any rule of general applicability or exceptions thereto." Pet. App. at 69a.

Rather than adopting EPA's wholly unsupported position, the Eleventh Circuit properly followed this Court's two-prong case-or-controversy analysis in *Nixon* in the context of intra-branch disputes, stating: "First, we must determine whether the issue is traditionally justiciable. Second, we must decide whether the setting of the dispute demonstrates true adversity between the parties. Applying that analysis here leads to the conclusion that this case presents a justiciable controversy." Pet. App. at 73a. Other federal courts have drawn a similar analysis from the *Nixon* decision. *See, e.g.*, *United States v.*

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[12] In fact, this case is at least the second "*TVA v. EPA*" case, and the first one proceeded without any ruling of nonjusticiability. *See TVA v. EPA*, 425 U.S. 934 (1976), *denying certiorari in Big Rivers Elec. Corp. v. EPA*, 523 F.2d 16 (6th Cir. 1975).

Fed. Maritime Comm'n, 694 F.2d 793, 810 (D.C. Cir. 1982) (adopting two-prong *Nixon* analysis at DOJ's behest); *Dean v. Herrington*, 668 F. Supp. at 653.

Nevertheless, EPA contends that the court below departed from existing precedent by establishing a "broad rule" of justiciability that would "potentially render[]" a wide variety of intrabranch disputes subject to review. Pet. at 22-23. But, as shown above, the Eleventh Circuit did not depart from existing precedent at all. Nor did it adopt a "broad rule." To the contrary, the Court of Appeals applied the *Nixon* analysis to the particular circumstances of this Clean Air Act case, in which EPA is directed to regulate TVA "in the same manner, and to the same extent as any nongovernmental entity," 42 U.S.C. § 7418 (2000), and is authorized to take action against TVA, including issuing enforcement orders. The CAA likewise expressly provides for judicial review of agency action. 42 U.S.C. § 7607(b)(1) (2000). In that context, the Eleventh Circuit stated a narrow holding: "We therefore find that *this particular controversy* between *these executive branch agencies* is justiciable." Pet. App. at 74a (emphases added).

Furthermore, Congress clearly contemplated that controversies between federal agencies under the CAA would be resolved in the courts. The CAA unambiguously authorizes EPA to sue TVA—it subjects federal facilities (such as TVA's fossil plants) to EPA regulation, 42 U.S.C. § 7418, and it expressly authorizes EPA to enforce the law by filing suit against federal agencies in district courts. 42 U.S.C. § 7413(b) (authorizing EPA to sue "any person"); 42 U.S.C. § 7602(e) (2000) (defining "person" to include "any agency . . . or instrumentality of the United States"). But as EPA recognizes, Pet. at 28, the necessary corollary of holding that TVA's appeal of EPA's order is non-justiciable is that EPA likewise cannot sue TVA to enforce the CAA. See Pet. at 4 ("[b]ecause the government views inter-agency litigation as non-justiciable . . . no judicial enforcement action could be

brought by EPA.").[13] See also Pet. App. at 73a n.19 (assuming a "symmetry" between TVA's right to seek review of EPA's order and EPA's right to seek enforcement of the order). Accepting EPA's justiciability theory thus would require treating the civil judicial enforcement provisions of CAA section 113 as *un*constitutional. The Court of Appeals properly rejected that theory, noting that Congress authorized EPA to sue TVA to enforce the CAA. Further review is unwarranted.

E. The Eleventh Circuit's Constitutional Ruling Does Not Warrant Further Review.

1. EPA's Proposed Construction of the CAA Would Result in Dismissal for Lack of Finality.

EPA asserts that the decision below "is based on a mistaken construction of the Clean Air Act[]." Pet. at 12. But the alternative construction of the statute EPA itself advances would require the same disposition as the judgment below, namely, dismissal of the case because the ACO was not final.

EPA's proposed construction omits any explanation of a key part of the CAA, 42 U.S.C. § 7607(b) (2000), which governs judicial review. Under that section, appellate jurisdiction hinges on finality. An EPA action that is "final action of the Administrator" may be appealed to the appropriate court of appeals. 42 U.S.C. § 7607(b)(1). The CAA precludes any other review of "final" EPA action, providing that "[a]ction of the Administrator with respect to which review could have been obtained under paragraph (1)

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[13] EPA does not deny that the CAA specifically authorizes the Government to pursue criminal actions against TVA's "responsible corporate officer[s]," 42 U.S.C. § 7413(c)(1) & (6) (2000), and authorizes private citizens to sue TVA, all for violating EPA's orders. 42 U.S.C. § 7604(a)(1). EPA may have chosen not to file a civil suit against TVA, but that does not make EPA orders unenforceable.

shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42 U.S.C. § 7607(b)(2). The Act thus sets up a clear dichotomy for judicial review: Final EPA action may be challenged *only* by an immediate appeal to the court of appeals and may not be challenged in a judicial enforcement action, 42 U.S.C. § 7607(b)(1)-(2); EPA action that is *not* final may not be reviewed in the court of appeals, 42 U.S.C. § 7607(b)(1), but there is no statutory bar to judicial review in a district court enforcement action.

In light of this statutory provision, EPA's proposed construction of the CAA necessarily renders ACOs nonfinal. EPA asserts that civil and criminal penalties may be imposed only for violation of a "*valid* order." Pet. at 14 (emphasis in original). In particular, EPA asserts that in a civil or criminal enforcement action in district court, sanctions are unavailable "if the court determines that the order is invalid because it is not the case that the subject of the order 'has violated, or is in violation of' designated provisions of the Act." *Id.* In other words, EPA contends that the validity of the order may be litigated in a subsequent district court enforcement action. But if EPA's construction is correct, then an ACO is *not final agency action* and it may not be reviewed in the court of appeals, precisely as the Eleventh Circuit held. That is, if the "validity" of the ACO may be examined in an enforcement action, then the ACO was *not* final—if it had been final, examination of its "validity" in the enforcement action would be precluded by section 7607(b)(2). The Eleventh Circuit recognized this point, stating that "[a]ny judicial manipulation of the statute that would permit, in the context of an EPA enforcement suit alleging a violation of an ACO, an inquiry into the underlying violation . . . would have the effect of making the ACO nonfinal." Pet. App. at 41a.

Accordingly, it is clear that, had the Court of Appeals adopted EPA's construction of the CAA, the result would have been the same—dismissal on the grounds that the

agency action was not final. Thus, there is no point in this Court's accepting EPA's request to review the Eleventh Circuit's decision.

2. EPA's Enforcement Powers Are Intact.

EPA cannot credibly contend that the Eleventh Circuit's decision "strikes at the heart of EPA's enforcement authority" (Pet. at 2) and inhibits "EPA's efforts to protect human health and the environment, especially where quick action is required." *Id.* at 18. This argument certainly does not apply to the ACO issued in this case, which addressed purported violations that occurred years (and even decades) before the ACO was issued—an ACO that EPA says is not enforceable in the courts. Pet. at 28.[14]

EPA's argument ignores the peculiar nature of this case, which EPA itself described as involving an "exceedingly unusual" (Pet. App. at 14a) adjudicatory proceeding that EPA invented for the "unique circumstance" (*id.* at 15a n.19) of the particular ACO involved here—a proceeding that EPA had never undertaken before, and may never use again. The ruling invalidating that particular procedure does not affect EPA's general enforcement authority. Indeed, the Court of Appeals instructed EPA that it may file suit against TVA in court, and therefore informed EPA that it had *not* fewer enforcement options as to TVA but *more*.

EPA also ignores the narrow effect of the Eleventh Circuit's ruling. The court held that "[t]he Clean Air Act is

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[14] Nor is the significance of ACOs generally a matter of record in this case. EPA's assertions about the extent to which it uses ACOs (Pet. at 18) and the nature of EPA's purportedly long-standing "understanding and practice" under the statutory scheme (Pet. at 10, 16) are wholly unsupported by the record here. If these types of matters are germane to the proper determination of the constitutional issue, as EPA suggests, then that determination should await another case with a record more fully developed by EPA.

unconstitutional to the extent that *mere noncompliance* with the terms of an ACO can be the *sole basis* for the imposition of severe civil and criminal penalties." Pet. App. at 46a (emphases added). To avoid that unconstitutionality, the court held that ACOs lack the status of law and are not final. This ruling does not generally invalidate the CAA's enforcement scheme, and its narrow reach leaves EPA with all of its legitimate enforcement powers intact.

Apart from section 113(a) ACOs, under the CAA EPA may use at least *four* separate enforcement mechanisms. As the Eleventh Circuit noted, in *all* cases EPA may use a formal penalty-assessment administrative adjudication, a federal court civil action, and a federal court criminal prosecution, Pet. App. at 5a-6a, and in *emergencies*—that is, "where quick action is required" (Pet. at 18)—EPA may issue administrative orders pursuant to statutorily specified procedural safeguards. 42 U.S.C. § 7603 (2000); Pet. App. at 23a-24a.

Moreover, nothing in the Eleventh Circuit's decision prevents EPA from issuing ACOs that lack finality, as EPA claims to have done for years. EPA long has taken the position that ACOs generally are not final, see Pet. App. at 27a, and that they "merely state EPA's position and are best analogized to a complaint. They allege EPA's position with respect to the relevant facts, the crux of the dispute, the procedural sequence, and EPA's legal position." *Solar Turbines Inc. v. Seif*, 879 F.2d 1073, 1079-80 (3d Cir. 1989) (footnotes omitted). Clearly, EPA may continue to issue ACOs to serve notice of EPA's position in order to obtain voluntary compliance with the law.

What EPA cannot do under the decision below is to use mere noncompliance with an ACO as the sole basis for the automatic "imposition of severe civil penalties and imprisonment—even if the EPA is incapable of proving an act of illegal pollution in court." Pet. App. at 39a. But EPA does not argue that it has (or even should have) such power. Pet.

at 14 (sanctions available "only [for] violation of a *valid* order") (emphasis in original).

Thus, the Eleventh Circuit's ruling does not deprive EPA of any of its legitimate enforcement tools, and further review on that basis is unnecessary.

3. There Is No Conflict Among Decisions Sufficient to Justify Further Review.

Although neither this Court nor any court of appeals has considered the due process issue addressed by the Eleventh Circuit, EPA contends there is a conflict among decisions. But the primary cases EPA cites in claiming a conflict—*Allsteel, Inc. v. EPA*, 25 F.3d 312 (6th Cir. 1994) and *Alaska Dep't of Envtl. Conservation v. EPA*, 244 F.3d 748 (9th Cir. 2001), *aff'd*, 540 U.S. ___, 124 S. Ct. 983 (2004)—do not actually conflict with the decision below because they do not address the constitutional issue underlying the finality ruling here.[15]

In particular, as the Eleventh Circuit correctly pointed out, both the Sixth Circuit in *Allsteel* and the Ninth Circuit in *Alaska* "fail[ed] to grapple with the constitutional problems that arise from" recognizing that ACOs have the status of law under the second factor of the *Bennett* finality analysis. Pet. App. 40a. Likewise, this Court's *Alaska* decision, rendered months after the decision below, did not reach the constitutional issues determined by the Eleventh Circuit; the Court recognized that "[n]o question has been raised here . . . about the adequacy of EPA's preorder procedures under the Due Process Clause or the Administrative Procedure Act." Slip op. at 17. See also reply brief of State of Alaska, Dep't

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[15] EPA also contends that the Eleventh Circuit's "reasoning" conflicts with four other cases holding that particular ACOs were not final. Pet. at 18 n.6. But those decisions also did not address the due process and delegation issues considered by the Eleventh Circuit here.

of Envtl. Conservation, 2003 WL 21999009, at *2 n.1 (Aug. 19, 2003), ("The constitutional issue decided in *TVA v. Whitman* . . . has not been raised in this case").

Further, both *Alaska* and *Allsteel* dealt with *pre*-construction orders issued pursuant to 42 U.S.C. § 7413(a)(5), a statutory provision different from § 7413(a)(1)-(3) at issue here. *Alaska* and *Allsteel* involved EPA's review of technical decisions made by state agencies in issuing permits and, unlike this case, did not involve EPA's unprecedented effort to use the ACO process to create retroactive liability long after construction had been completed. *See Alaska* slip op. at 29 ("This case . . . involves preconstruction orders issued by EPA, . . . not postconstruction federal Agency directives.").

Nevertheless, EPA contends that the decision below conflicts with *Alaska*. According to EPA, the Eleventh Circuit's "crucial error was the court's holding that EPA orders under the Act are not subject to meaningful judicial review," Pet. at 12, while in *Alaska* the Court "clearly conducted a more searching inquiry" under the "arbitrary [and] capricious" standard. *Id.* at 17. EPA misunderstands the Eleventh Circuit's decision.

The Eleventh Circuit's due process ruling is not premised on the absence of judicial review. Rather, it is founded on the absence of any statutory procedures for adjudication before a final ACO that creates liability for past conduct is issued. The court held that the CAA is defective to the extent that it provides for EPA to issue an ACO that determines legal rights without requiring EPA to afford the regulated party a full and fair hearing before an impartial tribunal at a reasonable time and in a reasonable manner. Pet. App. at 43a-44a. That is, the Eleventh Circuit concluded that the ACO could not lawfully determine legal rights because the CAA does not require adjudication *at the agency level* before an ACO becomes final and reviewable, not because of what

happens upon judicial review.[16] Thus, the key to the court's due process holding was the absence of pre-ACO adjudication—a matter EPA does not address in its petition. EPA's misreading of the decision below provides no basis for further review.[17]

4. If the Court Is Inclined to Grant the Petition, It Should Remand This Case to the Eleventh Circuit.

As explained above, TVA does not believe that the decision below conflicts with this Court's later decision in *Alaska*. If the Court disagrees, however, TVA respectfully suggests that the most appropriate course would be for the Court to remand this matter to the Eleventh Circuit for further consideration in light of *Alaska*. That course of action would

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[16] Indeed, appellate review of the merits of an agency determination made without due process would not be meaningful, since even the most searching review of the agency's decision could not supply what was lacking. *See Concrete Pipe and Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 618 (1993) ("Even appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator."); *accord Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 61-62 (1972).

[17] The court also stated that requiring a pre-ACO adjudication would only "highlight another constitutional problem with the CAA: the statutory scheme unconstitutionally delegates judicial power to a non-Article III tribunal." Pet. App. at 44a. This ruling, which *was* based on concerns about meaningful review, was separate from the due process holding, and is consistent with this Court's precedent. *See N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring) ("traditional appellate review by Art. III courts" insufficient to justify adjudication of state-law breach of contract action in non-Article III forum).

permit the Eleventh Circuit, in the first instance, to consider whether *Alaska* should have any effect on its analysis here.[18]

5. The Eleventh Circuit Correctly Decided the Due Process Issue.

Despite EPA's assertions of error, the court below correctly decided the due process issue in this case. The court's due process ruling was based on the peculiar nature of the ACO at issue, on the procedural unfairness of the so-called "adjudication" EPA undertook here, Pet. App. at 16a-18a, and on the fact that the CAA's "language and structure, in addition to agency practice, make clear that ACOs are issued without any adjudication," *id.* at 7a, but are intended to have the status of law. The court explained:

> The statutory scheme established by Congress—in which the head of an executive branch agency has the power to issue an order that has the status of law after finding, "on the basis of any information available," that a CAA violation has been committed—is repugnant to the Due Process Clause of the Fifth Amendment. Before the Government can impose severe civil and criminal penalties, the defendant is entitled to a full and fair hearing before an impartial tribunal "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965). . . . [T]he scheme enacted by Congress deprives the regulated party of a "reasonable opportunity to be heard and present evidence" [*citing Yakus v. United States*, 321 U.S. 414, 433 (1944)] on the two most crucial issues: (a) whether the conduct underlying the issuance of the ACO actually took place and (b) whether the alleged conduct amounts to a CAA violation.

Pet. App. at 43a-44a (footnotes omitted).

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[18] In its Petition for Rehearing, EPA did not advise the Eleventh Circuit that EPA had changed its position as to the finality of the ACO in the *Alaska* case.

Nothing in EPA's petition suggests that this holding was erroneous. To the contrary, all of the points identified by the Eleventh Circuit as supporting its decision are correct.

The CAA undeniably specifies severe civil and criminal penalties for the violation of an ACO. 42 U.S.C. § 7413(b), (b)(2) (2000) (civil penalties of up to $25,000 per day against any person who has "violated . . . any . . . order . . . issued . . . under this chapter"); 42 U.S.C. § 7413(c)(1) (criminal fines and imprisonment authorized against "[a]ny person who knowingly violates . . . any order under subsection (a) of this section").

In addition, the Eleventh Circuit properly stated the applicable rule of law: The Due Process Clause requires that "[b]efore the Government can impose severe civil and criminal penalties, the defendant is entitled to a full and fair hearing before an impartial tribunal 'at a meaningful time and in a meaningful manner.'" Pet. App. at 43a (*quoting Armstrong v. Manzo*, 380 U.S. at 552). EPA does not contend that the law is otherwise.

Further, as EPA itself acknowledged in briefing below, Pet. App. at 14a-15a n.19, neither the CAA nor any EPA regulation specifies *any* procedures whatsoever for providing any hearing of any kind before a section 113(a) ACO is issued, much less a full and fair hearing before an impartial tribunal.[19]

Nor has EPA historically provided a full and fair hearing before an impartial tribunal prior to issuing an ACO, and it

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[19] The *Vermont Yankee* principle that agencies may "fashion their own rules of procedure" in rulemakings, Pet. at 15 n.5, is simply inapplicable here. To afford an agency latitude to fashion rules of procedure in legislative rulemaking does *not* countenance a statutory scheme that affords no procedures for adjudication, or allow the agency to employ procedures in adjudication *without any rules* "on an ad hoc basis under the direction and control of the entity whose decision is being challenged," Pet. App. at 49a (Barkett, J., concurring), as EPA did here.

has no published procedures for doing so. As the Eleventh Circuit observed, without contradiction from EPA, "EPA has never (until now) undertaken a proceeding that even marginally resembles an adjudication prior to the issuance of an ACO." Pet. App. at 28a. And EPA conducted no hearing of any kind before issuing the ACO that was the subject of TVA's initial petition for review. *Id.* at 7a n.9.

Most significantly, the proceeding EPA conducted through its EAB after issuing the initial ACO, and after TVA had already petitioned for review of that ACO, was fundamentally unfair.[20] Although EPA attempts to describe its proceedings

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[20] Despite EPA's footnote assertions, Pet. at 15 n.5, TVA believes that it *does* have the right to be treated fairly by EPA. Administrative agencies that adjudicate are required to provide a fair trial in a fair tribunal. *Withrow v. Larkin*, 421 U.S. 35, 46 (1975). Further, the federal facilities provision of the CAA, which subjects federal entities to federal "process" in the same manner and to the same extent as "any nongovernmental entity," 42 U.S.C. § 7418(a), thus requires EPA to afford TVA the same process as that afforded to nongovernmental entities, including due process. *Cf. United States v. ICC*, 337 U.S. at 430 ("Unless barred by statute, the Government is not less entitled than any other shipper to invoke administrative and judicial protection."). Fairness is also required by 42 U.S.C. § 7601(a)(2)(A) (2000), which requires that when the Administrator delegates a matter to a Regional Administrator–as she did here for the issuance of the ACO–the Regional Administrator must "assure fairness and uniformity in the . . . procedures . . . applied." And although this Court has ruled that "the sovereign" is not a "person" for purposes of the Due Process Clause, TVA is not itself the sovereign, *Pierce v. United States*, 314 U.S. 306, 310 (1941), and this Court has never ruled that TVA has no due process rights. Even if TVA had no due process rights of its own, this Court has "permitted litigants to raise third-party rights in order to prevent possible future prosecution." *Powers v. Ohio*, 499 U.S. 400, 411 (1991), *citing Doe v. Bolton*, 410 U.S. 179 (1973). EPA's order has the effect of exposing TVA's responsible corporate officers to criminal prosecution, 42 U.S.C. § 7413(c)(1) & (6), and TVA has standing to challenge the order, including the process by which it was issued, to protect them from possible future prosecution. In the alternative, the unfair and irregular ACO ad hoc procedures were certainly arbitrary and capricious under the familiar Administrative Procedure Act standard.

in a more flattering light (Pet. at 5, 15 n.5), EPA does not take issue with the Eleventh Circuit's findings (Pet. App. at 16a-18a) that EPA failed to provide a neutral and independent decisionmaker, deprived TVA of any compulsory process to obtain discovery, limited the testimony at the hearing at the Administrator's behest, rushed the proceedings in a manner that deprived TVA of time to prepare its defense, "manufactured the procedures [it] employed on the fly, entirely ignoring the concept of the rule of law," and used these manufactured procedures "on a purely ad hoc basis."

In short, EPA issued an ACO to TVA long after TVA's repair projects had been completed, without any published procedures, and threatened severe sanctions for noncompliance. Then, when TVA challenged the ACO in court, EPA manufactured an ad hoc proceeding "on the fly" (Pet. App. at 17a) in an attempt to ratify its decision after the fact. Under such circumstances, the Eleventh Circuit properly held that the ACO had no legal effect, and that for TVA to be held liable, EPA must "prove the existence of a CAA violation in district court." Pet. App. at 46a.

CONCLUSION

For the reasons stated above, the Court should deny the Petition for a Writ of Certiorari filed by EPA.

Respectfully submitted,

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March 29, 2004

To facilitate orderly resolution of this proceeding, the Solicitor General has authorized TVA to represent itself in this proceeding before this Court.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

June 24, 2003

MEMORANDUM TO COUNSEL OR PARTIES

RE: 00-15936-TT Tennessee Valley Authority v. Christine T. Whitman

AGCY NO.: CAA-2000-04-008

Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to Rule 36 of the Federal Rules of Appellate Procedure. Fed.R.App.P. 39, 40 and 41, and the corresponding circuit rules govern costs and attorney's fees, petitions for rehearing, and mandate, respectively. The timing, format, and content of motions for attorney's fees and objections thereto are governed by 11th Cir. R. 39-2 and 39-3.

Except as otherwise provided by Fed.R.App.P. 25(a) for inmate filings, 11th Cir. R. 40-3 provides that a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within twenty-one (21) days of the date of this opinion and judgment, except that: in CIVIL cases in which *the United States or an agency or officer thereof is a party*, the time within which *any* party may seek rehearing shall be FORTY-FIVE (45) DAYS after entry of judgment. No additional time for service by mail is permitted.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed

by any party in the appeal. *See* 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. *See* 11th Cir. R. 35-6(k) and 40-1.

Counsel appointed under the CRIMINAL JUSTICE ACT must file a CJA voucher claiming compensation for time spent on the appeal *no later than* 60 days after either issuance of mandate *or filing* with the U.S. Supreme Court of a petition for a writ of certiorari (whichever is later).

Pursuant to Fed.R.App.P. 39, Costs taxed against petitioner.

For questions concerning the issuance of this court's decision, please call the "Reply To" number shown below. For all other questions, please call Warren, Alesha (404) 335-6224.

Sincerely,

Thomas K. Kahn, Clerk

Reply To: Anthony Meoli (404) 335-6147

Encl.